

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

IN THE MATTER OF )

1996 Annual Access Tariff Filing )

CC Docket No. 87-313

DA 96-28

Treatment of Video Dialtone Service )  
Under Price Cap Regulation )

CC Docket No. 94-1

DOCKET FILE COPY ORIGINAL

**OPPOSITION TO PETITION FOR WAIVER**

Adelphia Communications Corporation ("Adelphia") hereby submits the following opposition to Bell Atlantic's Petition for Waiver of Sections 61.42, 61.45, 61.47, and 61.48<sup>1/</sup> of Commission's rules. These rules, among other things, require Bell Atlantic to maintain a separate price cap basket in Bell Atlantic's 1996 Annual Access Tariff filing for video dialtone services authorized by the Commission.<sup>2/</sup>

In its Petition for Waiver, Bell Atlantic does not dispute the continuing existence of these price cap rules. Instead, Bell Atlantic argues that because the enactment of the Telecommunications Act of 1996 ("the Act") immediately terminates the Commission's regulations and policies with respect to the video dialtone requirements issued in CC Docket No. 87-266, there is "nothing left to include" in a separate video dialtone price cap basket.

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<sup>1/</sup>47 C.F.R. §§ 61.42, 61.45, 61.47, and 61.48.

<sup>2/</sup>See Price Cap Performance Review for Local Exchange Carriers: Treatment of Video Dialtone Services Under Price Cap Regulation, Second Report and Order, CC Docket 94-1 (rel. Sept. 21, 1995) ("Second Report and Order").

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While Bell Atlantic contends that the Act itself obviates the requirement for a separate price cap basket, it seeks a waiver "out of an abundance of caution." As demonstrated below, however, Bell Atlantic is simply wrong in its assertions regarding the effect of the Act on the separate price cap basket requirement as applied to Bell Atlantic's previously authorized video dialtone service in Dover.

First, Bell Atlantic has simply misread the statute in its haste to escape the application of what the Commission has deemed to be appropriate regulatory safeguards. The relevant subsection of the Act reads:

(3) **TERMINATION OF VIDEO-DIALTONE REGULATIONS** — The Commission's regulations and policies with respect to video dialtone requirements issued on CC Docket No. 87-266 shall cease to be effective on the date of enactment of this Act. This paragraph shall not be construed to require the termination of any video-dialtone system that the Commission has approved before the date of enactment of this Act.<sup>3/</sup>

As this language makes clear, the Act did not render Bell Atlantic's video dialtone service in Dover Township a nullity, leaving "nothing" to include in a separate price cap basket. Existing video dialtone systems such as that in Dover are grandfathered until new rules governing open video systems ("OVS") are implemented.<sup>4/</sup> Once the rules for OVS are finalized, Bell Atlantic acknowledges that the Commission may provide LECs with several alternative regulatory regimes for offering video service.<sup>5/</sup> In the interim, however, the status of existing video dialtone systems, including the separate price cap basket

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<sup>3/</sup>Telecommunications Act of 1996 at § 302(b)(3).

<sup>4/</sup>Id.

<sup>5/</sup>Petition for Waiver at 2.

requirement, remains unchanged. Put another way, in temporarily grandfathering existing video dialtone systems, Congress did not intend to give those systems a license to engage in cross-subsidization, predatory pricing, or other unfair practices.<sup>5/</sup>

Second, even if the Act's termination of video dialtone rules was not limited to future, rather than existing, LEC providers of video service, it plainly applies only to those video dialtone regulations established under Docket 87-266, not to Docket No. 94-1, which is the proceeding in which the separate price cap basket for local exchange carrier video dialtone services was established.<sup>7/</sup> Had Congress intended to terminate all of the regulations applicable to video dialtone services, it would have done so expressly.<sup>8/</sup>

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<sup>5/</sup>In addition, the goals behind maintaining separate price cap baskets for separate local exchange carrier services, to give carriers flexibility as an incentive to be efficient and productive without subjecting ratepayers to precipitous fluctuations in price or allowing LECs to favor one class of ratepayers at the expense of another class, are made no less relevant by the enactment of the Act. In fact, with increased entry of local exchange carriers into all sorts of new markets, especially video programming and delivery, the maintenance of separate price cap baskets becomes all the more important, not less.

<sup>7/</sup>See Second Report and Order at ¶ 15; see also In the Matter of Reporting Requirements on Video Dialtone Costs and Jurisdictional Separations for Local Exchange Carriers offering Video Dialtone Services, 10 FCC Rcd 11292 (1995).

<sup>8/</sup>Even if it is determined that the existing price cap basket rules are no longer applicable to Bell Atlantic's Dover Township video dialtone service, the Commission must take steps to ensure that costs are properly classified. For example, the Commission could impose subsidiary accounting requirements. Just as importantly, the Commission should promptly conclude the Dover tariff investigation and prescribe procedures for allocating the common costs associated with Bell Atlantic's video network. See In the Matter of Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 10 Rates, Terms, and Regulations for Video Dialtone Service in Dover Township, New Jersey, DA 95-1928, CC Docket No. 95-145 (rel. Sept. 8, 1995). Pending action on Bell Atlantic's tariff, the Commission should direct Bell Atlantic to exclude the costs associated with its video dialtone service from any rate base.

Finally, apart from its statutory argument, Bell Atlantic claims that the fact that it did not commence provision of video service in Dover until January 1996 creates a "practical impediment" to price cap regulation for that service warranting a waiver. In fact, Bell Atlantic has utterly failed to demonstrate the existence of "special circumstances" sufficient to justify waiver of the Commission's Rules.<sup>9/</sup> In its report and order establishing price caps for LEC video dialtone services, the Commission established rules to govern the initial rates to be included in a LEC's video dialtone basket.<sup>10/</sup> In that order, the Commission ruled that it would incorporate video dialtone rates into the new price cap basket in the first annual tariff filing following the calendar year in which the service is first offered.<sup>11/</sup> Thus, the Commission already has recognized that LEC price cap-based rates for video dialtone services offered pursuant to Section 214 authority often will not be implemented simultaneously with service commencement. This actuality poses no greater hardship for Bell Atlantic than it does for any other LEC video dialtone service provider authorized and operational at the time of enactment of the Act and therefore, subject to continued common carrier regulation under the Act's grandfathering provisions.<sup>12/</sup>

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<sup>9/</sup>WAT Radio v. FCC, 417 F.2d 1153 (D.C. Cir. 1969); see also, US West Communications, Inc. 7 FCC Rcd 4093 (1992).

<sup>10/</sup>See Second Report and Order.

<sup>11/</sup>Id. at 11103.

<sup>12/</sup>Moreover, pending the Commission's establishment of regulations to be applicable to OVS, it would be inappropriate to permit authorized video dialtone common carriers, including Bell Atlantic, to modify their rates on fourteen days' notice since such a shortened notice period would undermine the opportunity for interested parties to participate in the tariff review process -- a process which remains part of the Commission's rules for existing video dialtone services.

In short, Bell Atlantic's waiver request is nothing more than an attempt to avoid regulatory scrutiny of its entry into the video marketplace in competition with Adelphia. That Bell Atlantic would make such an effort is hardly surprising -- Bell Atlantic has repeatedly sought to find a way to provide video services with minimal regulatory oversight. As a result, it has rejected, over the last several years, both pure common carrier status and franchised cable operations. It now seeks to discard the video dialtone regulations while continuing to engage in activities beyond pure common carrier transmission.<sup>13/</sup> Considering that the Act requires the Commission to complete all proceedings establishing regulations governing OVS within six months,<sup>14/</sup> the waiver requested by Bell Atlantic is neither necessary nor appropriate. Congress did not intend to deregulate Bell Atlantic and those very few other authorized video dialtone systems immediately when it grandfathered those existing systems pending adoption of the new OVS regulations and to do so in Dover Township would greatly undermine the possibilities for fair competition between Bell Atlantic and Adelphia.

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<sup>13/</sup>Bell Atlantic argues that it should be allowed to operate its video dialtone systems under its common carrier access tariffs and the agency's rules for common carrier service. Adelphia submits that Bell Atlantic's relationship with Future Vision as well as the enhanced level 2 services it offers in Dover Township, go far beyond the "carrier/user" relationship with video programmers permitted for those telephone companies choosing the pure common carrier alternative. Bell Atlantic is not entitled to take the benefits of video dialtone status it has so avidly sought while being relieved of the regulatory safeguards established to ensure fair competition. See also note 8 *supra*.

<sup>14/</sup>Telecommunications Act of 1996 at § 302(a).

For the foregoing reasons, Adelphia opposes Bell Atlantic's petition for a waiver of the Commission's rules establishing a separate price cap basket for services formerly regulated as video dialtone.

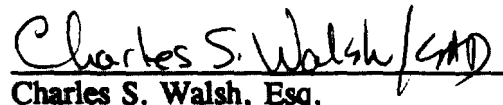
Respectfully submitted,

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Dated: March 1, 1996

## **CERTIFICATE OF SERVICE**

I, Eve Lehman, do hereby certify that on this 1st day of March, 1996, copies of the foregoing "OPPOSITION", were delivered by first-class, postage prepaid mail upon the following:

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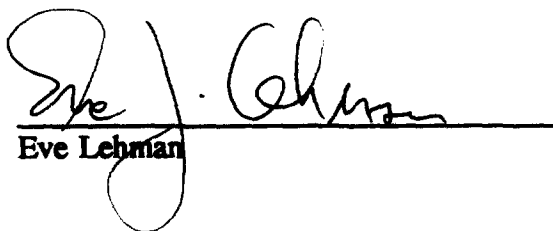
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